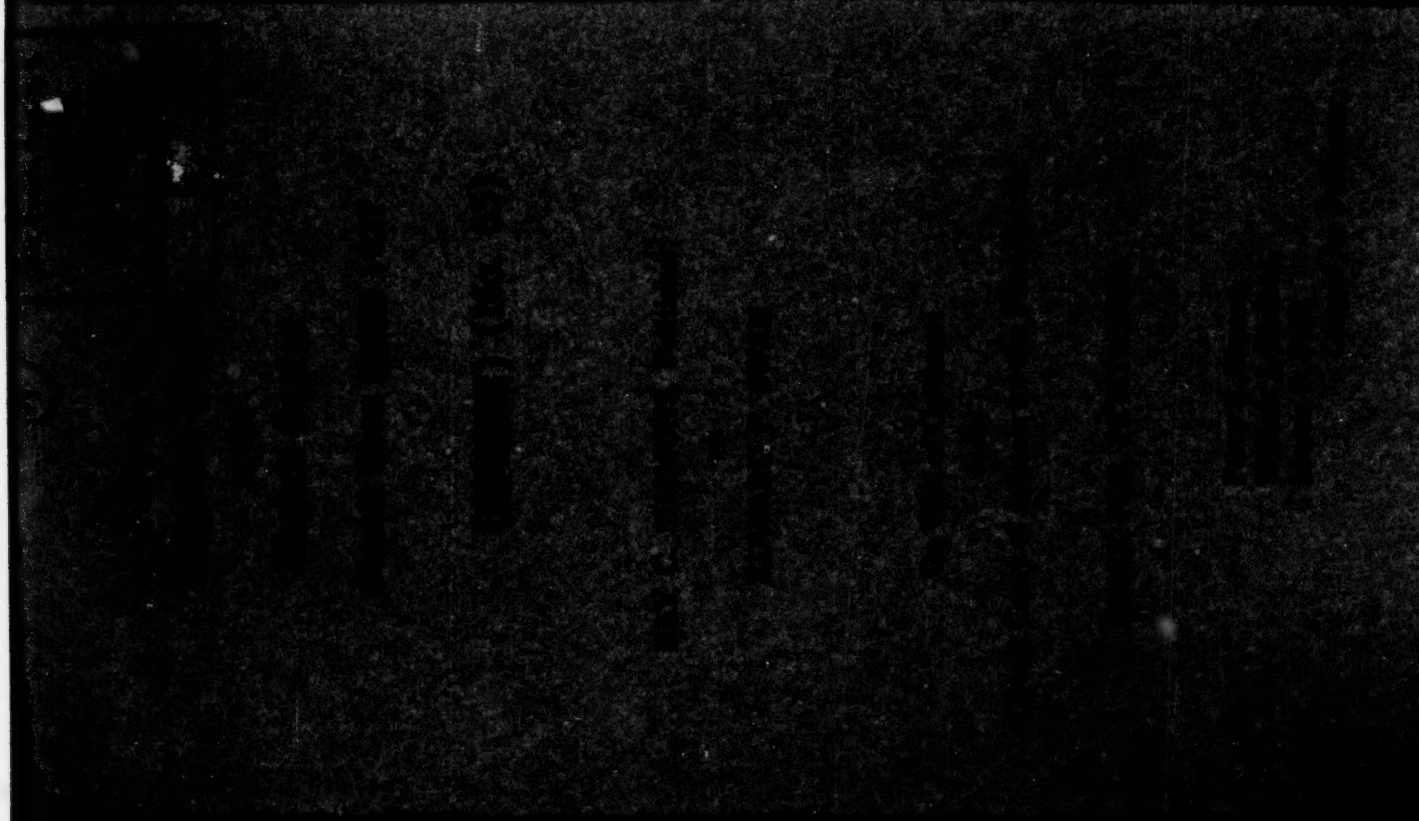

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# In the Supreme Court of the United States

## October Term, ~~1926~~ 1927

(~~No. 377~~) (No. 65)

RAY C. SIMMONS, Petitioner,

vs.

EDWARD P. SWAN,

## STATEMENT OF THE CASE

This case is here on writ of certiorari to review a decree of the Circuit Court of Appeals for the First Circuit affirming a verdict by Jury for the defendant rendered by direction of the Court in the District Court of the United States for the District of Massachusetts for recovery of damages for breach of contract.

The Petitioner is a resident of Connecticut, and the Respondent is a resident of Massachusetts. The action was brought in the United States District Court on account of the diversity of citizenship. The action was heard before a Jury, and a verdict for the defendant was rendered by direction of the Court.

The Bill of Complaint sets forth as Exhibit "A" a written contract between the parties, providing for the purchase and sale of a pickle business, with real estate and pickle stock, and alleges that at the time specified in the contract the plaintiff was ready, able and willing to perform all acts and things required of him to be performed by the terms thereof and that the defendant neglected and refused to perform and do the things

required of him by the contract, and claims by reason of said refusal on the part of the defendant damages in the amount of $25,000. The Answer denied each and every material allegation in the plaintiff's writ and declaration. (Said action was heard before a Jury and a verdict for the defendant was rendered by direction of the Court.)

Upon the pleadings and a Bill of Exceptions duly settled, the case was taken by writ of Error to the Circuit Court of Appeals for the First Circuit, which Court affirmed the decision of the District Court by a divided Bench, March 4, 1926. The issues before the Circuit Court of Appeals were:

Was the trial Court justified in directing a verdict or was there evidence from which the Jury might determine

First. Whether the plaintiff had performed all the things required of him to be performed and therefore was entitled to a verdict.

Second. Whether, if the plaintiff had failed to perform, was performance prevented or obstructed by the defendant.

Third. Whether the conduct and actions of the defendant were such as to estop him from demanding from the plaintiff in connection with documentary performance, pecuniary performance in legal tender dollars in lieu of the dollars ordinarily employed in commercial transaction.

## PETITIONER'S SPECIFICATION OF ASSIGNED ERRORS

First. The Circuit Court erred in deciding that there was nothing in the evidence to go to the Jury on the question whether the tender of performance on the part of the plaintiff was prevented or obstructed by the defendant.

Second. The Circuit Court erred in deciding that under the circumstances in the case, as established by the evidence, the defendant was entitled without previous notice or demand to have from the plaintiff a legal tender in money of the sum of $2500.00 after banking hours in Greenfield, Massachusetts, on October 31st, 1923.

Third. The Circuit Court erred in deciding that there were no material disputed questions to be determined by the Jury, and that the District Court was justified in charging the Jury to return a verdict for the defendant.

Fourth. The Circuit Court erred in failing to hold that the trial court, in deciding that the plaintiff failed in his general tender of performance, was influenced by the erroneous claim of the defendant that under the provisions of Massachusetts law, the plaintiff's wife should have joined with the plaintiff in executing a purchase money mortgage of real estate.

## ARGUMENT

The vital question in this case is whether there was evidence pro and con before the Jury from which it could determine whether or not the plaintiff was able, ready and willing to perform his contract, and if he failed in any particular whether or not such failure was caused by the defendant and due to his acts or omissions.

By the terms of the contract (Record Page 5 Exhibit A) the plaintiff was required:

1. To pay $500.00
2. To pay $2500.00
3. To make his demand note for $12,000.00
4. To execute a mortgage of the real estate purchased securing the payment of his $12,000.00 note.
5. To execute a mortgage of the personal property

purchased as collateral security for the payment of the unpaid purchase money.

6. In conjunction with his associates in The Silver Lane Pickle Company, Messrs. Gould and Molumphy, to execute a demand note for whatever sum should be determined to be the amount of the purchase price of the pickles in stock.

The defendant was required

1. To execute with his wife a deed of real estate.

2. To execute a bill of sale of certain personal property.

The plaintiff and defendant, jointly, were required

1. To determine from the books of the defendant the number of pickles in stock.

2. To compute the amount to be paid therefor at the rate of $4.00 per thousand.

Within the time limited and at the place specified, viz. on Monday, October 1st, 1923, at the law office of Davenport & Fairhurst, in Greenfield, Massachusetts, certainly by noon, the plaintiff appeared, and as he claims, able, ready and willing to perform his part of the contract.

This Court will note

1. That up to the time of the appearance of the plaintiff at the office of Davenport & Fairhurst, the amount of the note to be given for the pickle stock had not been determined.

2. That the plaintiff had with him his two associates in The Silver Lane Pickle Company, Messrs. Gould and Molumphy, who were required to sign, as makers, the note to be given for the pickle stock.

3. That no information could be obtained regarding the whereabouts of the defendant.

4. That Mr. Fairhurst declined to do any business with the plaintiff until the arrival of the defendant.

5. That the defendant, although promising by telephone to be present at three o'clock, did not arrive until long thereafter, and not until long after the close of banking hours, and did not ask for money until seven o'clock.

6. That not until after the defendant's arrival at the office of Davenport & Fairhurst was his deed of the real estate executed.

7. That the defendant knew, or at least supposed, the pickles were purchased for The Silver Lane Pickle Company.

8. That defendant asked The Silver Lane Pickle Company for its check for approximately $15,000.00 in payment for said pickle stock.

9. That defendant refused to accept a check or obligation for $2500.00 issued by The Produce National Bank of South Deerfield, Massachusetts, a town in which the defendant was a resident, and a bank so well known and so reliable that the Court declined to hear evidence as to its solvency.

10. That the refusal to accept this obligation was so late in the day that the plaintiff or his associates could not exchange the obligation at a Greenfield bank, or at South Deerfield, twenty minutes away by automobile, for currency.

11. That if this bank obligation had been refused earlier in the day, when the defendant's agent, Mr. Fairhurst, at the time and place specified for "tender of performance" had refused to do any business until the defendant arrived, the plaintiff could easily have exchanged it for "money."

12. That from the inception of this transaction

several weeks before September 13th until the instant of its termination in the evening of October 1st the word "money" never was mentioned.

13. That in the preliminary negotiations in the drafting of the contract; in investigation of the defendant's books to determine the selling price of pickles in stock; during the long and tedious wait at the office of Davenport & Fairhurst for the arrival of the defendant; during the discussion of details after the defendant's arrival; and not until it was apparently certain from the lateness of the hour that all banks were closed, was "money" mentioned.

14. That checks, and personal checks at that, as distinguished from bank obligations, were the only medium of exchange used or suggested by the plaintiff and defendant.

15. That the defendant even asked in writing for a check of approximately $15,000.00, in lieu of a note for like sum (Record Page 28).

16. That pickles in stock, by reason of the destruction by frost of the major part of the crop, had vastly increased in value between September 13th, the date of the execution of the contract, and October 1st, the date for consummation thereof.

We think it well settled law that if one party to a contract refuses to perform his agreement, the other party can recover compensation for the injury he suffers by such refusal, and we think it equally well settled law that if one party to a contract is prevented from performing his part of the contract by the other party to the contract he can still recover whatever damages he suffers.

We contend that if one party to a contract is hindered, obstructed or prevented from effecting performance of his part by the other party he can recover.

In the trial of an action where there is conflicting testimony as to whether or not the plaintiff was ready, able and willing to perform all acts and things required of him to be done and performed, and as to whether or not the defendant neglected and refused to perform and do the things required of him, it is the *province of the Jury* to weigh the testimony and determine the facts.

If any substantial testimony in this case was offered to prove that any failure on the part of the plaintiff was due to hindrance, obstruction or prevention of the defendant, it was the *province of the Jury* to weigh such testimony and to determine its effect; and we respectfully contend that the Court erred

(a) In depriving the Jury of this function

(b) Substituting its own conclusion for any conclusion the Jury might have reached

(c) In directing the Jury to reach a certain conclusion.

The Courts have discussed the question of "tender of performance" in cases of mutual and concurrent promises.

In Smith vs. Lewis, 26 Conn. 109, at page 119, the Supreme Court of Connecticut said,

> "Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word "tender", as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains

to be done but the transaction is completed and ended, but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering. It is not an absolute unconditional offer to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement."

This decision has been quoted with approval, and so far as we know has never been disapproved.

In Clark vs. Weis, 87 Ill. 438, the exact language is quoted in extenso.

The Petitioner respectfully insists that the decision of the Circuit Court of Appeals be reversed because

(1) In the language of Judge Anderson, dissenting, "The result reached is grossly unjust to the plaintiff. More important, the decision commits this Court to a rule of law entirely inconsistent with modern business practices, and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligations of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right enforcer, ought not to be

allowed to drag unnecessarily behind the established, honest practices of the business community," and because

(2) The decision of the Circuit Court of Appeals deprives the plaintiff of his constitutional right to have determined by a jury the question of fact as to whether or not the conduct and action of the defendant did, in fact, constitute an obstruction or prevention of tender of performance of the contract by the plaintiff, and because

(3) The admitted error by the trial judge in construing the state law of Massachusetts that a wife must join with her husband in the execution of a purchase price mortgage deed so influenced and warped his judgment as applied to the other questions in issue as to create a conclusion relating to the other issues which was unjust and unfair to the plaintiff. (Record Page 193)

(4) There was evidence to go to the Jury to establish breach of contract and deceit on the part of the defendant when said evidence induced the trial judge to make the following observations during the course of the trial:

> "It is perfectly obvious that he (the defendant) was trying to get out from under his contract." (Record Page 69)
>
> "Your man (the defendant) was pretty careful to keep away until the banks were closed." (Record Page 70).

And again after a statement made by counsel that the certificate of deposit was as good as cash, the Court said:

"It happened to be. There were no grounds to think it wasn't. I agree that his (the defendant's) attitude was entirely unreasonable and taken by a man who wanted to escape his honest obligations." (Record Page 71).

5. Whether or not the conduct and action of the defendant did estop him from demanding from the plaintiff $2500 in legal tender money in lieu of a certificate of deposit issued by a national bank of admitted solvency which was tendered to him.

We contend that under the authority of cases such as Smith vs. Lewis, 26 Conn. 102 Clark vs. Weir, 87 Ill. 448

the plaintiff was clearly not bound to execute a mortgage of real estate not yet conveyed to him; to pay the defendant more money for that real estate to issue and put into circulation his note for twelve thousand dollars in addition to the $8500 already paid, to pay for the personal property mentioned in the contract and to obligate himself and his associates to pay approximately $15,000 for the pickles in stock unless and until the defendant was ready to convey the real estate to the plaintiff and give him possession or proper instruments of title of the personal property as provided in the contract.

A readiness by the plaintiff to perform provided the defendant was also ready, with notice to the defendant to that effect, was equivalent to what his contract called upon him to do.

We contend that the plaintiff was not only willing and ready to perform but he was also able.

He was not called upon merely to pay a debt or to satisfy a simple monetary obligation. He was required

to do a number of different things arising from mutual and concurrent promises. Besides issuing notes for approximately twenty-seven thousand dollars he was to turn over less than one-tenth of this sum not specifically in cash, specie, legal tender or bank bills, but in the language of the contract in "dollars".

This sale and purchase was a commercial transaction not at all differing from an every day affair. The parties in interest are ordinary business men. The word "dollars" had for them no technical meaning. They used it in this contract the same as they used it in their ordinary business commercial transactions.

It is within bounds to say that at least ninety per cent of all their monetary transactions are in the same medium as that used in the general commercial world. Actual currency is but a drop in the bucket when compared with the transactions by check and other forms of bank credit. The fact that the plaintiff had the commercial equivalent of "dollars" in the form of a bank obligation issued by a well known substantial National Bank in lieu of paper or silver or gold "dollars" was absolutely immaterial unless and until the defendant gave the plaintiff some intimation that he would not accept "dollars" used in ordinary commercial transactions but would insist upon having "dollars" of a different kind.

This notice the defendant failed to give until it was too late in the day to exchange the "dollars" which the plaintiff had for the "dollars" which the defendant demanded.

Our contention is sustained in a comparatively recent case (1929) decided by the Circuit Court of Appeals for the 9th Circuit

Servel vs. Jamieson, 255 Federal 892

In this case the plaintiff had contracted for a large

number of lambs at a certain price per pound to be weighed and paid for at a future date. At the time of making the contract a substantial amount had been paid by check. Between the making and date fixed for performance the market value of lambs had materially increased. Time had been made of the essence of the contract. On the day for the completion of the contract the parties met, the weighing of the lambs was completed and the amount to be paid was determined.

The plaintiff was not present in person, but was represented by an agent named Stitt, who was directed by one of the defendants to go to the home of the other defendant for settlement. Arriving there the defendant sought was not to be found. The agent then returned, found both defendants, and offered a check in settlement, which the defendants refused to accept. Several hours had been consumed in the travel and meantime the banks had closed, the day being Saturday. The check offered in settlement was good and could have been converted by the plaintiff into cash had the refusal of acceptance been made during banking hours.

Suit was brought to recover damages, and these facts being proved, the Court directed a verdict for the defendant.

The Circuit Court of Appeals in reversing the judgment rendered upon this verdict said:

> We think that the defendants stood strictly within their rights in refusing the check which was tendered by Stitt. It is the well settled rule that the tender of a check in payment of money is of no effect in cases where objection is made to that medium of payment. (Cases cited.) Nor should it be held that the defendants by accepting a check for the payment made at the time of entering into the contract bound themselves

to accept a check at the final performance thereof or waived the right to demand that the final payment be made in currency. The case is unlike Gunby vs. Ingram, 57 Wash., 97, etc., where a series of payments of interest on a mortgage had been made by check and it was held that the tender of a check for another installment was sufficient to prevent the exercise of an option to declare the whole debt due.

In the present case, the defendants might well accept a check for the first payment for they parted with no right of possession of the property contracted to be sold, but when it came to the final payment and the delivery of the property to the plaintiff to be taken out of the state they were entitled to demand that they be paid in money and not by a check upon a bank in a sister state.

Time was expressly made of the essence of the contract and by the agreement of the parties the contract was to be fully performed on September 29, 1917.

This was not done but there was testimony tending to prove that on September 29th, after the lands had been weighed at 8 o'clock in the morning, the defendants avoided the plaintiff's agent and delayed meeting him for the final settlement until after four o'clock in the afternoon.

A tender is waived where the person to whom it is to be made in any way obstructs or prevents a tender.

38 Cyc. 135, Hunt on Tender, Sec. 52
Schaeffer vs. Coldiron, 247, Pa. 77, 85
Atl. 98, Ann. Cas. 1914B, 178

"In view of these features of the evidence and the plaintiff's offer of proof from which the jury might have found that but for such delay the currency might have been obtained to make payment on the day, we think it was error to direct the jury to return a verdict for the defendants.

"The Judgment is reversed and the cause is remanded for a new trial."

The case at bar differs from Servel vs. Jamieson above only in that in the latter the obstructing and preventing a tender of performance occurred *after* all things had been done except actual payment while in the case at bar the obstructing and preventing occurred *before* the time for actual payment and before the plaintiff even knew all that he must do to tender performance.

The plaintiff was entitled *to have the jury decide* whether or not Swan, knowing the plaintiff was coming that day, kept away for any ulterior purpose and whether Mr. Fairhurst's refusal to do business until his principal arrived was in fact an obstruction and prevention. Mr. Fairhurst may have been perfectly innocent of any wrong doing, but considering the relation of principal and agent between Swan and him, the plaintiff was entitled to have the jury determine whether his acts did, as a matter of fact obstruct and prevent.

In considering the acts of persons, the elements of good faith and common honesty are important.

It is not the province of Courts to aid a litigant to avoid his honest obligations. It is not for the Court to prevent the jury from saying whether or not certain proven acts hindered or obstructed. Nor is it for the Court to determine whether or not the evidence proves certain facts. While the admissibility of the evidence is a matter for the Court, its weight, importance and con-

In support of our contention that tender is waived where the person to whom it is to be made in any way obstructs or prevents a tender, reference is called to the case of Cheney vs. Libby, 134 U. S. 68-79 where Justice Harlan, delivering the opinion of the Court, said

"The question to be determined is, whether there was any such default upon the part of the plaintiff, Libby, as deprived him of the right of specific performance.***** Although the contract between Cheney and Libby called for payment in dollars, the latter might well have supposed, unless distinctly informed to the contrary, that the former would be willing to receive current funds, that is, such as are ordinarily received by men of business or by banks. * * * While this course of business was not an absolute waiver by Cheney of his right to demand coin or legal tender paper in payment of notes subsequently falling due, such conduct, * * * * was calculated to produce the impression upon Libby's mind that current or bankable funds would be received * * * and, therefore, upon every principle of fair dealing, Cheney was bound to give reasonable notice of his purpose * * to accept only such funds as under the contract, strictly interpreted, he was entitled to demand. No such notice was given. On the contrary, the just inference from the testimony is, that Cheney designed to throw Libby off his guard, and rendered it impossible for the latter * * * to supply the requisite amount of coin or legal tender paper on the very day the notes matured, and at the moment of their presentation for payment. * * * To permit Cheney, under the circumstances disclosed, to enforce a forfeiture of the contract would enable him to take advantage of his own wrong, and to reap the fruits of a scheme formed for the very purpose of bringing about the non performance of the contract."

While the facts in the case above cited differ in degree from the case at bar, the principle announced by this Court is on all fours with the claims made by this plaintiff that the defendant should not be permitted to avoid his just obligations under a contract by insisting upon the payment of legal tender money when he had misled the plaintiff into believing that legal tender money would not be demanded.

In support of this doctrine, and on waiver of tender, see also *Williston on Contracts* (1922) *Section* 1819.

sequences are matters for the jury. The Court has ultimate control of any misuse of this power by the jury by refusing to accept a verdict of the jury or by setting it aside after acceptance.

Silver certificates and National bank bills, as well as legal tender government notes are indiscriminately used by everybody who is fortunate enough to have either and, even if the plaintiff had twenty-five hundred dollars in cash in his pocket, the defendant could have refused to take it if one of the bills chanced to be a silver certificate or a five dollar bill issued by the National bank in which he kept his deposit. Would any Court under the circumstances of this case on account of that five dollar bill allow this defendant to avoid his honest obligations? A five dollar bill issued by The Produce National Bank of South Deerfield, Massachusetts, was no better or no worse, as far as its nature is concerned, than a twenty-five hundred dollar certificate of deposit issued by the same bank.

Cashier's checks from their peculiar character and general use in the commercial world, are regarded substantially as the money which they represent, a rule that is not extended to the case of ordinary checks of the depositor drawn on his bank.

Ruling Case Law, Vol. 5, Pg. 484 (bottom)

Hathaway vs. Delaware County 185 N. Y. 368,

78 N. E. 153, 18 L. R. A. (N. S.) 273

When time is not of the essence of the contract, neither party can rescind or claim a violation of the contract after performance becomes due without giving the other party an opportunity to make tender of performance. On the other hand, the duty is imposed on the other party to the contract to make within a reasonable time after the performance is due, a tender of performance

unless excused therefrom by the attitude of the first party.

It is therefore clear that if it were not for the fact that the contract in question in this case contains a clause whereby time is made of the essence of the contract, the defendant, under the circumstances of this case, would not have had any right whatever to declare the contract forfeited on the part of the plaintiff. The only question then is, whether or not under the circumstances of this particular case, with such a clause as the above mentioned in the contract, the defendant was justified in declaring the contract forfeited and entitled to retention of the $800 plus the value of the salt used in the attempt by the plaintiff to protect the property which he had purchased under the contract.

Any forfeiture of the contract in question as sought to be made by the defendant would be manifestly unfair and unconscionable and should not be permitted. The plaintiff in good faith visited the premises of the defendant, looked over the pickle stock with the defendant, and at the instigation of the defendant, but at expense to himself, sent from East Hartford, Connecticut, to South Deerfield, Massachusetts, a ton of salt and occasioned the deposit of this salt in the brine solution in the pickle vats, so that the cucumber pickles might be preserved.

The plaintiff, on October 1st, 1923, at about the hour of ten o'clock A. M., arrived at the place of business of the defendant in South Deerfield, Massachusetts, and attempted to consummate the deal. Finding the office of the defendant locked, the plaintiff called at defendant's home, where he could get no information whatever as to the whereabouts of the defendant. The plaintiff then proceeded to the office of Davenport & Fairhurst, some eight miles away, at Greenfield, Massachusetts, where the final papers were to be drawn and executed

This was the office of counsel for the defendant. No information was forthcoming at the office of Davenport & Fairhurst.

During all of the time between twelve o'clock noon and a quarter of six in the afternoon the plaintiff was constantly in attendance upon the office of Davenport & Fairhurst, in good faith, and little suspecting that anything other than good faith was being practiced by the defendant. The plaintiff offered to leave his papers after execution, with the attorneys of the defendant. This offer was rejected. (Record Pages 190-191.)

A communication from the defendant had indicated that the defendant would accept a check for a much larger amount of money (about fifteen thousand dollars) if the plaintiff would make payment, in lieu of note for the pickle stock. (Record Page 28).

Not until seven o'clock, nearly three hours after all banks had closed in Greenfield, Massachusetts, and the bank at South Deerfield, also, had closed, did the defendant intimate that he would not accept a cashier's check on the South Deerfield National Bank or a check of the plaintiff in payment of the sum of twenty-five hundred dollars due under the contract.

The Court will doubtless take judicial notice of the fact that comparatively few obligations are met by legal tender. Practically all the business of the country is conducted upon a credit basis by means of checks and drafts. Plaintiff was ready, able and willing to perform all his obligations under the contract, and offered to do so within the time limited by the contract and in accordance with the universal method of performance in commercial dealings, and particularly in accordance with the custom prevailing between the parties heretofore. This was all that any person could reasonably expect under the circumstances.

Forfeiture has been defined as follows by the Court:

"A forfeiture is where a person loses some right, property, privilege or benefit in consequence of having done or omitted to do a certain act."

Vol. 2 Words & Phrases, 611 2nd Ed.

"Forfeiture usually signifies loss of property by way of compensation for injury to the person to whom the property is forfeited, as well as punishment."

Idem.

"Forfeiture is a penalty for doing or omitting to do a certain required act."

Idem.

It is evident that if under the circumstances of this case, the defendant is deemed justified in refusing to go through with his legal contract, the plaintiff will suffer a forfeiture of $800 paid on September 15th, 1923, and a forfeiture of the value of the salt and use of drivers used in preparing the pickles at South Deerfield, Massachusetts.

It is elementary that forfeitures are not favored and that they will not be enforced where they will work an injustice.

"Forfeiture will not be enforced when the party for whose benefit it was inserted had waived the provision or is estopped to insist upon its enforcement, or performance has been prevented by some intervening circumstances sufficient to relieve the party from the performance of any other provision of the contract." Pratt vs. Daniels Jones Co., 133 Pac. R. 700, (Supreme Court of Montana).

"A party will be relieved from forfeiture if his breach of duty was not grossly negligent, wilful or fraudulent'."

Cook Reynolds Co. vs. Thipman, 47 Mont., 298.

No forfeiture should therefore be permitted when the "breach of duty was not grossly negligent, wilful, or fraudulent."

Plaintiff does not concede that he was guilty of any breach of duty, but even though he were, it was not grossly negligent, wilful or fraudulent.

The offered performance by the plaintiff was made in good faith and was designed to secure to the defendant all benefits reserved to him by the contract and would have done so if accepted. Such refusal on the part of the defendant evidently was made not in good faith, but to avoid the contract. If the defendant merely desired what was coming to him he could not consistently have rejected the offers of payment made. By reason of the advance prices of pickles between the date of the contract and the time limited for its consummation, their value on October 1st, 1923, was approximately $23,000, more than the contract price, making a very strong inducement to make an excuse, no matter how slight, for repudiation of the agreement.

Furthermore, such suspicion is emphasized by the fact that not one word was said by the defendant either by himself or through the defendant's counsel, about "money" until after the banks were closed October 1st, 1923, and the defendant knew that it was then impossible to secure it.

The plaintiff arrived at the office of the defendant's counsel on October 1st, 1923, about noon, and there was all that time until three o'clock in the afternoon when the plaintiff could have procured "money" but in further-

ance of his design, the defendant absented himself and came to the office of his counsel two and three-quarters hours after he knew the banks had closed.

During the afternoon of said October 1st, 1923, the plaintiff and his associates polished the stairs and floors of the offices of counsel for the defendant by walking in and out, patiently awaiting defendant's arrival.

In this case, however, the defendant waited until he knew it was physically impossible for the plaintiff to produce "money", and then made demand, not because he wanted it, but because he perceived a chance to use that pretext as a means of escaping his obligation to deliver the property in question.

Where a party designedly absents himself from home, for the fraudulent purpose of avoiding a tender, he cannot object that no tender was made.

Southworth vs. Smith, 61 Mass. (7 Cushing) 391.

"But even if the tenant had not purposely avoided and had been absent from home from necessity or other causes, with no intention to evade a tender, and in consequence of such absence, the demandant, by the use of due diligence, was unable to find the tenant, or any person authorized to act in his behalf and was thereby prevented from making the tender seasonably, no forfeiture of the estate would be incurred. The demandant has shown a readiness and due effort on his part to perform the legal duty required of him, and a failure to accomplish it through no fault on his part, but because the act of the tenant had put it out of his power."

Southworth vs. Smith, 61 Mass. (7 Cushing) 393.

Borden vs. Borden, 5 Mass. 67.

Evasion of one party on delivery of deed.

Gilmore vs. Holt, 4 Pick., 257, 264

Designedly evaded a tender where money was due

Tasker vs. Bartlett, 5 Cush., 359

Absence from Commonwealth excused obligee from further performance when advised by wife of obligor that he was absent

An agreement to procure a good warranty deed on a certain day is satisfied if the grantor is then ready to tender the deed, and is prevented from doing so by the fraudulent evasion of the grantee

Borden vs. Borden, 5 Mass., 67

Tasker vs. Bartlett, 59 Mass., (5 Cushing) 363

Southworth vs. Smith, 61 Mass., (7 Cushing) 391

Thayer vs. Turner, 49 Mass., (8 Metcalf) 555

For the effect of readiness and willingness to perform without actual tender see

Linton vs. Allen, 154 Mass., 432

Attempted payment by mortgagee is held equivalent to tender in

Schayer vs. Com. Land Co., 163 Mass., 322

Where one has offered to make payment by a medium which is recognized as a customary and usual method of payment, the contract itself not requiring payment by any particular kind of money or currency, and by natural inference, both from the contract, from the former payment thereunder, and from correspondence between the parties, it is fair to presume that a check will be acceptable, and where a person goes to the trouble to secure a cashier's check or certificate of deposit on a bank with which the other party was well acquainted as to its financial stability and such offer has been refused

by the promisee, then he has made such substantial performance as will sustain an action upon the contract.

"It has been frequently held that acts insufficient in themselves to make a complete tender may operate as a proof of readiness to perform, so as to protect the rights of a party under a contract where proper tender is made impossible by reason of circumstances not due to fault of tenderer."

Schaeffer vs. Coldren, 88 Atlantic, 98

Hault vs. Huyett, 71 Atlantic, 843

See 844 2nd col.

29 American and English Encyclopedia of Law, 2nd Ed., 697

"In the absence of any provision in the contract, or of any circumstances explaining it, contracts for the payment of money refer to the ordinary and usual currency in which business is transacted."

90 S. W., 1210; Fidler vs. Kalbfleisch

52 N. Y., 28

By fair inference, in construing the contract in this case, the plaintiff might very reasonably have concluded, as he obviously did believe, that the defendant expected a payment of the twenty-five hundred dollars by his check.

Assuming that the defendant would be entitled, if demanded, to be paid in legal tender, we contend that the inference reasonably to be drawn from the contract and from the customs of the country necessitated that the defendant give notice in some manner to the plaintiff that he would require payment in legal tender money.

It was provided in the contract that "tender of

performance shall be sufficient on the part of the party of the second part if on said day (October 1st, 1923) the sum of twenty-five hundred dollars, plus suitable notes and mortgages are left with said Davenport & Fairhurst for delivery to the party of the first part.

When the party of the second part (the plaintiff) signed the contract, he in effect said "I will be on hand not later than October 1st, 1923, at the office of your lawyer to receive proper transfers of the property and to deliver the necessary papers on my part, and to pay you twenty-five hundred dollars by the usual medium of exchange," and in compliance therewith he was at the place necessary, promptly, on time, ready to receive his papers and to pay for them as promised.

The fact that the defendant accepted a check upon the bank of the plaintiff at East Hartford, Connecticut, located in a different State sustained such an interpretation.

> "Where the parties to a contract or a deed have done any acts or made any settlement under it, those acts are facts admissable in evidence to show the contemporaneous construction put upon the instrument by the parties."

Lovejoy vs Lovett, 124 Mass., 270

The plaintiff acted in accordance with the usual business custom and usage, and having tendered such performance, he substantially at least performed his obligations under the contract, and is entitled to sustain his action thereon for damages.

The plaintiff tendered his payment within the time and in the manner contemplated by the contract.

*Payment by legal tender would be an unusual method of payment, and a method for which the plaintiff could not be expected to be prepared.*

It would be little short of ridiculous for the plaintiff to bring from his home in East Hartford, Connecticut, to South Deerfield, Massachusetts, twenty-five hundred dollars in legal currency on his person for the purpose of paying this amount under his contract to the defendant. Particularly is this so when we find that some two weeks before, by the terms of the contract itself, he had paid by check the sum of five hundred dollars, and had been requested by the defendant to make payment "by check" of nearly fifteen thousand dollars on the very day when, as it turned out, the defendant declined the obligation of a National Bank for twenty-five hundred dollars. There can be but one conclusion. The defendant's action was the trick of a man determined to avoid his just obligations.

In characterizing the conduct of the defendant, the Court below said:

> "It is perfectly obvious that he (the defendant) was trying to get out from under his contract." (Record page 64); and

> "Your man (the defendant) was pretty careful to keep away until the banks were closed." (Record page 70)

Again, after a statement made by counsel that the Certificate of Deposit was as good as cash, the Court said:

> "It happened to be. There were no grounds to think it wasn't. I agree that his (the defendant's) attitude was entirely unreasonable and taken by a man who wanted to escape his honest obligations." (Record page 71)

When the plaintiff journeyed to Greenfield, prepared to make payment by valid check or certificate of deposit, accompanied by the ones whose signatures he had agreed to provide as joint makers of the fifteen thousand dollar

note, and with all the other papers duly prepared and executed, he certainly had done all that could be expected of him under the usual methods of business transactions.

The failure of the parties to carry into consummation the transactions provided for in the contract was due to the act of the defendant in asking and demanding of the plaintiff that he do something which had not been anticipated by the plaintiff, and which, under the usual methods of transacting business, could not be anticipated, and at the time of asking could not be done.

Although time is made of the essence of the contract,

> "If the party prevents performance by the other, he cannot insist on the stipulation."

13th Corpus Juris, 689.

Courts are constituted to insure honest and fair dealing between men and to punish fraud and deceit. If defendant is permitted to escape his obligations under this contract in the manner in which he has attempted to do, then the result is punishment for him who has, in good faith, attempted to fulfill his agreement, and reward for him who, by fraud and trickery, seeks to avoid his obligations.

The trial court was in error in deciding that the law of Massachusetts required the signature of the plaintiff's wife upon the mortgage tendered by the plaintiff as part performance under the contract.

> "A conveys land to his four sons in fee, who, by deed of the same date, mortgage the same land to the father, to secure the payment of a sum of money, and also a maintenance for the father during his life, it was held that the two deeds were parts of the same contract, and that the

seisin of the sons was not sufficient to entitle the widow of one of them to her dower in the land."

Syllabus in Holbrook vs. Finney, 4 Mass., 566.

"Evidence that the grantee in a deed reconveyed the granted premises to his grantor by a deed of mortgage dated and acknowledged on the same day when the deed to him was acknowledged, and recorded on the same day when the deed to him was recorded, is sufficient to authorize a finding that his seisin was only monetary, although the deed to him was dated several days before it was acknowledged."

Syllabus in Pendleton, et ux vs. Pomeroy, et al, 4 Allen, 510.

See also

Libbey vs. Tolden, 192 Mass., 175, 184.

1. We believe that the decision in this case is in conflict with the decision of the case of Servil vs. Jamieson decided in the Ninth Circuit. This conclusion is supported by the dissenting opinion of Mr. Justice Anderson who says, "The case for the plaintiff is at least as strong as in Servil vs. Jamieson, 255 Fed. 892, where the Court of Appeals for the Ninth Circuit reversed the ruling of the District Court like the one made by the Court below in this case, holding the case was for the jury."

2. We believe that the decision in this case should be reversed because it has decided an important question of general law in a way probably untenable as applied to modern business practices. In the words of Mr. Justice Anderson dissenting, "I find no case which on fair analysis of the facts go so far in support of an inappropriate and unnecessarily technical rule as does the decision of the majority in this case. This decision extends a rule that

should be narrowed. What the business community understands the word 'payment' to mean should so far as possible be its meaning in law. At any rate, attempts to escape performance of contract obligations by invoking technicalities of this sort call for a liberal interpretation of the doctrine of estoppel and the submission of all questions of fact to the conscience and intelligence of the jury."

3. We believe that the decision in this case should be reversed because, in the words of the dissenting opinion, "The decision commits this court to a rule of law entirely inconsistent with modern business practices and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligation of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right enforcer, ought not to be allowed to drag unnecessarily behind the established, honest practices of the business community." After careful consideration of the record, Mr. Justice Anderson reached the conclusion that "in this case the result reached is grossly unjust to the plaintiff."

4. We believe that the decision in this case should be reversed because the Circuit Court of Appeals erred in construing the provision of the contract which required that $2500, in view of the preceding relations, customs and precedents between the parties, meant, so far as the transaction in question was concerned, legal tender money when examination of the record will disclose that the defendant not only had accepted the plaintiff's check for a substantial amount theretofore but had by letter requested the payment by check of $15,000, a sum six times as great as the amount for which the defendant afterwards demanded legal tender in payment thereof. Not only in accordance with the practice that had been previously established between

the parties but in exact accordance with the established practices in the overwhelming majority of commercial transactions involving any substantial amount, the plaintiff in good faith tendered to the defendant not alone his own check but actually made physical tender of a certificate of deposit on a national bank of conceded soundness.

5. We believe the decision in this case should be reversed because the defendant, by his actions and his letter asking for a check from the plaintiff for a much greater amount, estopped himself from demanding legal tender in the amount of $2500. In the words of the dissenting opinion, "The gist is that the defendant left the plaintiff without the slightest reason to expect that payment by the usual method in all substantial business transactions would not be accepted.

Cf. Shutte vs. Thompson, 15 Wall. 151, 159, 160;

Wight vs. Davidson, 181 U. S. 371, 377;

Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 560;

Baker v. Humphrey, 101 U. S. 495.

6. We believe that the decision in this case should be reversed because there was substantial evidence in this case for the jury of waiver or estoppel. In the words of the dissenting opinion, "In my opinion there was abundant evidence in this case for the jury of such waiver or estoppel. The defendant's motive to escape from his contract was obvious, for, because of a frost, the stock of pickles he was selling were then worth substantially more than the contract price. He did not reach the place agreed upon for completing the trade until after the close of ordinary business hours. This was a most significant fact. It was at least six or seven o'clock in the evening before the papers were ready to be passed. Then, for the first time, the defendant refused to accept

the plaintiff's check, demanded cash, and, failing to get it, left the office."

7. And finally we believe the decision in this case should be reversed because a court of justice is placed in a position where it is made to appear to lend itself to the promotion of trickery and fraud. In the words of Mr. Justice Anderson dissenting, "There were other facts and circumstances tending to show that the defendant sought, and found (as is now in effect held), a chance to trick the plaintiff out of rights arising under any fair and honest code of business ethics."

Respectfully submitted,

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